IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 06-02-2002

CORAM:

THE HON'BLE MRS. JUSTICE PRABHA SRIDEVAN

Appeal Suit No.773 of 1987 and Tr. Appeal No.429 of 1989

1. M.K. Kuttan Pillai(died)
2.Smt. J. Chellamma
3.K. Thulasidharan
4.K. Radhakrishnan ... Appellants in
A.S.No.773 of 1987
K. Thulasidharan ... Appellant in
Tr.Appeal No.429 of 1989

-Vs-

National Insurance Company
Limited, incorporated under
the General Insurance Business
Nationalisation Act, represented
by the Regional Manager
Southern Regional Office
having office at No.768, Mount
Road, Madras û 600 002. ... Respondent

Prayer in A.S.No.773 of 1987 :
Appeal against the judgment and decree dated 27-09-1983 in O.S.No.98 of 1980 on the file of the Subordinate Judge, Nagapattinam. Prayer in Tr.Appeal No.429 of 1989 :
Appeal against the judgment and decree dated 27-09-1983 in O.S.No.87 of 1982 on the file of the Subordinate Judge, Nagapattinam.

! For appellant :: Mr. V. Lakshmi Narayanan
for Mr.A.J.Abdul Razack

^ For respondent:: Mr. Nageswaran

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: COMMON JUDGMENT
The appellant claimed that two ships Kalpana I and

Kalpana II were destroyed during the cyclone that hit Nagapattinam on 11-11-1977. Both the ships were insured with the respondent herein against all loss and damages and against adventures under perils of the sea. The policy with regard to Kalpana I (K1 in short) commenced from 13-04-1977 and ended with 12-04-1978, whereas the policy for Kalpana II(K2 in short) commenced from 12-08-1977 and 11-11-1977. The respondent settled the claim of the appellant in respect of K1 but not in respect of K2 , since the time of the loss was crucial with regard to K2, the policy expiring with 12 midnight on 11-11-1977. The respondent directed a second investigation and on that basis came to the conclusion that there was no satisfactory proof that K1 and K2 were anchored at Nagapattinam at the relevant time and therefore, the Insurance Company was not liable. The respondent thereupon filed O.S.No.98 of 1980 for recovery of Rs.82,248/being the amount settled by the respondent for the claim made on K1 together with interest. The appellant filed O.P. NO. 3 of 1980 before the Subordinate Judge, Quilon for recovery of the amounts payable in respect of K2. This was transferred to the file of the Subordinate Judge, Nagapattinam as O.S.No.87 of 1982. Both the suits were heard and tried together. The Trial Court came to the conclusion that the claim in respect of K1 was false and that K2 was not sunk in sea owing to the cyclone. 20 documents were marked on the side of the plaintiff, who is the respondent herein and four witnesses were examined. 17 exhibits were marked on the side of the defendant, who is the appellant herein and four witnesses were examined. Aggrieved by the judgment and decree, the present two appeals have been filed. The respondent's suit was decreed. The appellant's suit was dismissed.

2. Mr. Lakshmi Narayanan, learned counsel appearing for the appellant briefly stated the facts of the case:

Originally, the owner of K1 was the father of the appellant herein, one Kuttan Pillai. He died and the appellant was brought on record as his Legal Representative. The appellant was the owner of K2 and therefore, now the appellant in Tr. Appeal No.429 of 1989, alone is interested in both the boats. These two boats were insured with the respondent herein. Both the boats are engaged in fishing in eastern and western coasts. When they were fishing in seas of Chennai some disturbance arose between catamaran operators and mechanised fishing boat operators, and therefore, on 08-11-1977, the boats started from Kassimode Boat basin. As per schedule, the boats ought to have reached Nagapattinam on 09-11-1977 to proceed to Mandapam, thereafter. By the time the boats arrived at Nagapattinam Port, the driver of K2 informed the appellant that the rudder shaft of K2 was broken. So the appellant arranged for K1 to tow K2 to Nagapattinam Port and arranged for the repairs of the rudder shaft at M/s. Kumaravel Engineering Works. K2 was refitted on the morning of 10-11-1977. The boats could not start from

Nagapattinam because of rough sea and cyclonic warning was raised by the Port Authorities. So the boats were anchored to the wharf at the Nagapattinam Port and were secured with proper watch and wards. At about 7 p.m when the appellant went to the Port Office, the entire crew members were on board. The boats started dashing against each other. The appellant rushed to the Port Office and met D.W.3, the Meteriological Observer, who was on duty. He also reported to one Govindarajan, Inspector of Fisheries, Nagapattinam, who went to the wharf with the appellant, the boats by then had gone adrift. Because of the inclement weather, no help could be given. The authorities were informed on 11-11-1977 immediately after the incident. On the morning of 12-11-1977, a search was made and some parts of both the boats were recovered. A telegram was sent to the respondent on 13-11-197 7. A protest was lodged on 27-12-1977 to the Port Officer, since he was away. One J.B. Boda, Marine and General Survey Agencies Private Ltd., Madras conducted a detailed survey regarding the occurrence, place of occurrence, time of occurrence etc., and examined the concerned persons. They gave a report concluding that the loss of two vessels was a total loss. So according to the learned counsel, when the agency engaged by the respondents themselves had reported that there was a total loss, there was no justification for the respondent to engage another investigating agency on behalf of whom P.W.2 has given evidence. According to the learned counsel, the report given by the second detective agency marked as Ex-A13, is nothing but a comment on Ex-A6, which is the first survey report. A perusal of the report shows that no independent investigation has been done. The learned counsel also submitted that while the agency engaged initially by the respondent is an expert in investigation of Marine Insurance claims, the agency engaged thereafter had no such special expertise. He would also submit that the investigation was held clandestinely and behind the back of the appellant and therefore, cannot be relied on. He also submitted that Ex-A6, which is the first survey report had been forwarded by the Investigating Agency to the respondent alongwith some enclosures which include the original statements, the true copy of protests etc., and these are not produced by the respondent before the Court, but were deliberately burked and therefore, adverse inference ought to be drawn. He submitted that in any event the scope of the second report was confined entirely to K2 and therefore, placing reliance on that the suit filed by the respondent ought not to have been decreed, which related to K1. The learned counsel submitted that there was no reason for D.W.3 to depose falsely on behalf of the appellant, who is a mechanised boat operator from Quilon, Kerala. He also submitted that when the narration of events show the frantic efforts made by the appellant from about 8.30p.m on 11-11-1977 it was farfetched to hold that the whole case was stage-managed him. In particular they would point out to the investigation conducted by the first agency namely J.B. Boda, where they have examined the officers,

who were contacted by the appellant. J.B. Boda had also inspected some of the salvaged materials one of which bore the letters "ANA I", which obviously belong to "KALPANA I". The learned counsel also submitted that the Court below erred in not adverting its attention to Ex-P15 to 17, which were all certificates issued by the Sub-Inspector, Nagapattinam regarding that the appellant had given a petition on 12-11-1977 regarding the accident. The learned counsel also pointed out that the respondent cannot claim that the boats were plying in area where permission was not granted because Ex-B5 and the annexure to Ex-A1 would show that specific permission was granted to ply in the port limits of Tamil Nadu and Pondicherry from 07-11-1977 to 31-01-1978. He would submit that when the report of Boda which is Ex-A6 stands uncontroverted, it would show that at 8.30p.m., the appellant was making desparate attempts to contact the officers, and so the respondent cannot evade their liability under the policy which expires only at 12.00p.m. There was a safe three hour period which gave no room for any doubt or ambiguity. He also submitted that the Court below erred in coming to the conclusion that when the cyclone hit only at 12 midnight on 11-11-1977, the boats could not have sunk at 8.00p.m, because it was clearly the evidence that rough weather started sometime around 7.00p.m itself and the appellant had taken all efforts to keep the boats secure and safe. It was also submitted that merely because the reports of the missing, damaged or salvaged boats did not bear the names of K1 and K2 it cannot be said that they were not lost. He would submit that if the receipt issued by Kumaravel Engineering Works, which was with the respondent, had been produced, it would have clearly shown that K2 and K1 were anchored at Nagapattinam. He also submitted that the Court below erred in giving too much weight to the evidence of P.W.3, who had stated that a boat must necessaril y enter the bar channel to get into the Wharf and before entering the bar channel a fee of one rupee per day must be paid as channel fee. The learned counsel would submit that in the evidence of the same witness it is also found that sometime they do no collect at the time of entry but they recover it later. So merely on the basis of the fact that the entry fee had not been collected the claim of the appellant cannot be rejected. He would also submit that it was the case of the appellant that K2 was tied securely with two ropes to the wharf and K1 was tied to K2. Therefore, according to the learned counsel when the respondent had accepted the loss of K1, necessarily they ought to have accepted the loss of K2 because both were tied together. He would submit that there was no justification for the respondent to claim return of the amount that had been settled under the policy with relation to K1. He would pray that both the appeals should be allowed.

3. Mr. Nageswaran, learned counsel for the respondent on the other hand would submit that the contract of insurance is based on warranty of legality and if it is proved that the

insured has committed any illegality, the insurer stands absolved from any liability. According to him, the Master of the vessel, which in the case was the Tindal, ought to report the arrival of the ship to the authorities within 24 hours and in this case, according to the appellant, they had entered the Nagapattinam Port on 9th itself an d until the alleged loss they had not reported their presence. According to the learned counsel ' adventure' would mean and include the movement of the ship from one port to another. So their presence at Nagapattinam without reporting the authorities was illegal. This was an act of illegality during the course of the adventure and hence the insurer need not indemnify the loss. The learned counsel would explain that a suit had to be filed because it was found that a false claim has been made by wilful misrepresentation which led the surveyor to produce an incorrect report in respect of K1, and therefore, the respondent was entitled to the amount claimed.

4. As regards K2, he would submit that since the exact time of accident is not known and since the policy expired at 12 midnight on 11-1 1-1977 and since the first investigating agency's report was not adequate to clarify these doubts the second investigating agency was engaged. He would submit that when the report of the first investigating agency is not satisfactory and a false claim is made, they are entitled to engage another detective agency to investigate the same. The nature of the investigation demanded secrecy, otherwise it would defeat the purpose because the appellant would fill up the lacuna in his case if he knew about the second investigation. He also submitted that the evidence with regard to the presence of the two boats was very vague, since, none except the appellant himself as D.W.1 has spoken of the presence of the two boats. The appellant had not chosen to examine the crew members. He had examined in addition to himself the photographer, who took pictures of the wreck, who had nothing really material to say about the existence of the boat, D.W.3, Meteriological Observer, who had no personal knowledge of the presence of the boats and who had also not seen them, would merely say that the appellant had told him at about 8.00p.m that ships had sunk and finally D.W.4, who is an Inspector of United India Insurance Company had spoken to the fact that on 11-11-1977, the storm commenced at 7.00p.m. Apart from this, there is no acceptable evidence regarding the two boats and therefore, the appellant is not entitled to any relief.

5. The learned counsel relied on the following decisions: (a) M/s.Bihar Supply Syndicate Vs. Asiatic Navigation(AIR 1993 SC 2054)where the Supreme Court held that the consignor should prove that the cargo was lost due to perils of sea. (b) Mewa Lal Jha Vs. King Emperor (1925 Patna 535), wherein it is stated that "unlawful" means contrary to law laid down by the Act or rules framed thereunder. (c) Emperor Vs.

Fazlur Rahman (AIR 1930 Patna 593)wherein it was held that, "The learned Judge appears to have been under the impression that in order to constitute an offence under S 385 the threat must be of some conduct which might either constitute an offence in criminal law or which might be made the basis of a civil action for damages; but he has failed to observe that this does not exhaust the definition of the word "illegal" contained in S.43 and has omitted to read the words therein "or which is prohibited by law". The word "illegal" has been given by the section a very wide meaning and it has the same meaning as "unlawful". (d) Kesava Rao Vs. Subbaraju (AIR 1957 AP 55), wherein it was stated thus: "Legality and regularity" are well understood terms and well recognised grounds of judicial interference on an appeal or revision. An order is illegal if it is opposed to any enactment or any rule having the force of law. It is irregular if the procedure followed is in violation of the principles of natural justice and fair play."

(e) James Yachts Ltd., Vs. Thames & Mersey Marine Insurance Co. Ltd., and others (1977 I Lloyd's Law Reports). In this decision the Insurance was with regard to the boat builders' risk. The Insured did not inform the Insurer that the legal authority had not given the builder the permission to carry on business at that premises. It was held by the Supreme Court of British Columbia and Canada that the Insurer could avoid the liability on the policy.

6. Mr. Lakshmi Narayanan, learned counsel for the appellant, in reply would submit that this question of illegality was not raised in pleadings. In any event, the Act itself permits the payment of penalty by the owner of the boat, if there is a default in reporting promptly. Therefore, he would submit when the lapse can be rectified it cannot be an illegality, because it would lead to the curious position of the Insurance Policy lapsing because of non-compliance within the time stipulated and reviving on its own when the lapse is rectified. According to the learned counsel this ground of illegality raised by the respondent must be rejected.

7. The question for consideration is whether the respondent is entitled to get back the money paid in full and final satisfaction of the claim in respect of K1 and whether the appellant had proved that he is entitled to be indemnified by the Insurer for the loss of K2.

8. The claim in respect of K1 can be taken up first since the claim in respect of each of the boat stand on a different footing. Ex-A1 is the policy and the boat has been insured from 13-04-1977 to 12-04-1978. Though originally it was stipulated that the vessels should not be employed from 1st January to 31st January, subsequently, on payment of additional

premium, permission was granted. In Ex-A2, dated 17-11-1977, the letter written by the father of the appellant, who was the then owner it is stated that K1 was anchored inside the Nagapattinam Port with a long rope and that it sank into the sea. Ex-A3 would prove that the respondents themselves were aware of the dispute between the catamaran operators and the fishing boat operators, which was the reason for the appellant removing his boats from Madras to Mandapam. Ex-A5 is the protest which is dated 27-12-1977. The counsel for the respondent would submit that the protest could have been lodged immediately, since even notary public are authorised to do it. The fact remains that the protest was not lodged with the said Port officer immediately, but only on 23-12-1977, since he was not available in the relevant date. In this it is stated that,

"we securely tied the said launch Kalpana No.1 at the wharf and were keeping watch."

9. Ex-A6 is the report conducted by the Boda Agency in respect of the alleged sinking of K1 and K2. Their opinion is that the incident may have taken place as reported. Ex-A7 is the note to the Deputy Manager wherein the officer had recommended that since the loss of K1 had been established, the claim may be settled and that as far as K2 is concerned it is better to determine the exact time and therefore, special investigation must be initiated. Ex-A8 also confirms that the claim in respect of Ex-A1 should be settled. Ex-A9 is the acknowledgment of the cheque in full and final settlement of the claim. It is clear that as regards K1, the policy was in force and the respondent was also satisfied that it was lost in the manner claimed by the appellant. The Marine Insurance Act defines "Marine Adventure" thus: 1.any insurable property is exposed to maritime perils; 2. the earnings or acquisition of any freight, passage money, commission, profit or other pecuniary benefit, or the security for any advances, loans, or disbursements is endangered by the exposure of insurable property to maritime perils; 3. any liability to a third party may be incurred by the owner of or other person interested in or responsible for, insurable property by reason of maritime perils;

The nature of warranty is referred to in Section 35(1), (2) and (3).
Section35.Nature of Warranty-- (1) A warranty, in the following sections relating to warranties, means a promissory warranty, that is to say a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts. (2)A warranty may be express or implied. (3)A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so

complied with, then subject to any express provision in the policy the insurer is discharged from liability as from the date of the breach of warranty but without prejudice to any liability incurred by him before that date.

Under Section 36 of the Indian Ports Act it is possible to waive the breach of warranty. Warranty of legality which was referred to by the learned counsel for the respondent would mean that the adventure insured is a lawful one and that so far as the assured can control the matter the adventure can be carried out in a lawful manner. Under Section 39 of the Indian Ports Act, the Master has to report his arrival within 24 hours after the arrival and shall also be liable to pay the Port dues. Under Section 39(2), a Master failing without wilful excuse to make such report within the time of the said vessel shall be punished with fine. Section 43 provides that no Port-clearance shall be given until Port charges are paid. Under Section 44,Port charges payable in one port shall be recovered in other Port. Section 45 deals with penalty for evading payment of port charges. The very fact that under Section 39(2) of the Indian Ports Act, the possibility of a lawful execution being available for not reporting the arrival within 24 hours would show that the failure to do so is not a illegality which will avoid the contract of insurance.

10. If one were to accept the submissions made on behalf of the respondent then 24 hours from the time when K1 entered Nagapattinam that is on 10-11-1977 the policy would lapse, because the entry of K1 and K2 was not reported. But the evidence of P.W.3, which is also in consonance with the provisions of the Act runs thus:

"If the boat has to enter it can do so only through the entrance point."

and thus:

"We can collect the boat channel fee even later."
(the English version of the evidence)

Therefore, the fact that the wharf fee was not paid cannot by itself prove that K1 was not at the Port nor is it an act of illegality which would result in the policy lapsing. The Act provides for imposition of penalty if the charges are paid after the stipulated time and the Act also provides for indulgence being shown to the Master if lawful excuse is given. The very fact that even in the evidence the witness submits that very often they would collect the fee later would show that it is not an illegality.

11. The cases relied on by the learned counsel for the respondent do not come to his aid. In AIR 1925 Patna, what is unlawful is defined but as we have seen even the Act provides for subsequent payment and condonation of the lapse. Therefore, the non-payment within 24 hours is not an illegality. AIR 1930 Patna 593 and AIR 1957 AP 55 also will not come to his aid. As regards the decision in 1997 Lloyd's law Report, there the learned Judges held that the insurer is entitled to avoid policy because the local Authority refused permission on the ground that the using of the premises was a high hazard risk. It transpired thereafter that a fire broke out resulting in loss to the insured. In these circumstances, it was held that there was a breach of warranty for the insurer ought to have been put on notice that the boat building activity is a highly hazardous one, which is definitely one of the basic factors that would weigh that the insurer before entering into the contract of insurance. In this case, there is no pleading to the effect that the boats were tied, where they ought not to have been tied. In fact, the policy itself provides the boats shall not be employed during unsafe weather conditions and they should be anchored or moored and they should be secured with proper watch and ward. In this case, the weather conditions were unsafe, the evidence and pleadings that K1 was secured and provided with watch and ward had not been denied. The boat was also tied to the wharf, where it should be tied.

12. It is also relevant to note that apart from the evidence of P. W.3 and the provision regarding warranty of legality there is no basis for the appellant recalling the claim made by the claimant in respect of K1. We have seen that both these factors do not help the respondent in any way. The SDB's report which is Ex-A14 was only with reference to K2 and not K1. So investigation could also have been made only with regard to K2. Any observation or finding rendered by this Detective Bureau will have no bearing in respect of K1. Ofcourse, in a further report which is subsequent to 18-09-1979 long after Ex-A14, was filed the Chief Investigator, who is P.W.2 would know that the fact that the owner of K1 and K2 had not been prosecuted by Port Authorities would afford positive proof that K1 and K2 were not in the wharf. This additional report has been obtained only to form the basis of the second suit. The following paragraph and findings in Ex-A6 is as follows: "We also inspected the materials recovered from the sea shore of Nagapattinam, which were lyilng near an Ice Plant and part of a wooden hull was found with the marking of "ANA I" on it. We are of the opinion, that this marking on the hull may belong to KALPANA I. The diesel tank, exhaust pipe, cabin door and wooden planks from the engine room were identified by Mr. Thulasidharan as belonging to Kalpana I."

13. K1 had come to Nagapattinam. The document Ex-A6 shows that K1 had indeed entered the Port and had subsequently

been lost. The policy provides for that the vessel shall not be employed through unsafe weather conditions and when not in use the vessel should be safely anchored or moored with proper watch or wharf. The pleadings are to the effect that K1 was safe with proper watch and ward. The Court below had placed its decision only on the investigation of P.W.2, which was only with regard to K2. The part of the wooden hull bearing "ANA I" must belong to K1(KALPANA I), unless the respondent shows there was another boat bearing a name ending with these letters.

14. In these circumstances, the suit filed by the respondent must necessarily be dismissed and the judgment and decree in O.S.No.98 of 1 980 is setaside.

15. As regards K2, the matter stands on a different footing altogether. The policy expires with the midnight of 11-11-1977. The appellant will have to establish beyond doubt that the vessel was lost due to perils at sea before midnight. The appellant will also have to prove beyond doubt that the vessel was anchored at the wharf. In this regard, if one sees the earliest document dated 17-11-1977 it states that,

"I anchored the boat inside Nagapattinam Port, tied the boat with strong rope and chain. Ofcourse this is with reference to K1."

16. In Ex-A5 which is the protest note again it is stated that,

"we securely tied the said launch K1 at the said wharf and were keeping watch."

It must be remembered that the protest note was lodged only on 27-12-1977. There is no reference to K2 in the protest note. The counsel for the appellant would submit that the presence of K2 is proved by the fact that the vessel was repaired by Kumaravel Engineering Works and the bill paid to Kumaravel Engineering Works had been given to the First Investigator or namely J.B. Boda and that Ex-A6 also referred to it. But if one looks at Ex-A14, the second report, it is stated therein that the enquiries made at Kumaravel Engineering Works did not furnish any information regarding the identity of Gurumurthy whose signature is found in the bill. In the report is is also stated that, "the shaft itself was said to have been welded by Mr. Annamalai, the brother of Mr.K. Shanmugham who is the Proprietor of the aforesaid Firm. Mr. Annamalai stated that the shaft was in their Firm for 3 days. This is in direct contradiction with the version of both Mr Gowdaman and Mr Thulasidharan who affirmed that the shaft was given for welding on the evening of 9th November 1977 and refitted to the boat (Kalpana II) on the morning of 10th November 1977."

17. The witness P.W.2, J.A. Harees, who is the chief Investigator of the Agency which issued Ex-A14 had also stated that from his enquiries he came to the conclusion that the vouchers produced for K2 was procured. The appellant has not chosen either to call upon the respondent to produce the original bill or to examine someone from Kumaravel Engineering Works to testify to the fact that K2 boat was repaired there. In the absence of any satisfactory evidence to show that K2 was repaired by Kumaravel Engineering Works this Court cannot accept the same. It is also the case of the appellant that the fuel for both the boats were obtained from one Joseph, who is a prawn merchant. This Joseph is not examined. And, even if Joseph had supplied fuel it will not prove the presence of K2 at the wharf. Ingeniously the appellant had tried to fill up the gap with regard to presence of K2 by stating for the first time in his pleadings as follows:

"Kalpana No.2 was secured with 2 ropes (one manila and one terylene) to the concrete piles on the wharf and Kalpana No.1 was secured with 2 similar ropes to Kalpana NO.2."

18. Presumably, this was done, because there was proof for K1 being there and if the Court accepted that K1 was secured to K2 he would obtain compensation for the claims in respect of both the boats. According to the appellant he had asked one Mr. Govindarajan to come and see that his boats which were going adrift. Ex-A6 also refers to this. But Ex-A6, also shows that Govindarajan could not ascertain the identity of the boats, which were going adrift. The appellant has not chosen to examine the said Govindarajan. D.W.3, the Meteriological Observer, about whom it was told that he is an officer, who has no axe to grind has not stated anything about K2. The nonpayment of the fee at the barchannel is not relevant for deciding the claim of K2, for the reasons given supra. As stated earlier the rules provide for condonation of delay in reporting the entry of the vessel and the evidence of P.W.3 is also to the effect that they would collect the fee when the boat left sometimes and if they did not collect it then they would recover it later. The relevant sections which have already been extracted also show that Port charges in respect of one Port can be collected from the other Port. But this apart, the evidence with regard to K2 is far from satisfactory. There is absolutely no material to show that K2 entered the Nagapattinam Port or that it was lost due to perils at sea or more importantly assuming that K2 entered the Nagapattinam Port it was lost before midnight of 11-11-1977. The investigation done by the second investigating agency is relevant:

"Evidence, oral, documentary and circumstantial that had emerged during enquiries shows that 'Kalpana II' has not been lost from the wharf at Nagapattinam on the night of 11/12th

November 1977 as claimed by the Insured. Records maintained at the Police station, Nagapattinam Town and the office of the Deputy Director of Fisheries, Nagapattinam belies the claim of the Insured that 'Kalpana II' was lost on the night of 11th November 1977 when Nagapattinam was struck by the cyclone. There is not a shred of evidence to show that 'Kalpana II' was lost at Nagapattinam on the night of 11th November 1977 as claimed by the Insured and that too before 12 midnight that date. Note: No mention is made about 'Kalpana I' as this has not been referred to S.D.B for enquiry"

19. To this the appellant has no answer except to say that if the case regarding K1 has to be accepted then the case regarding K2 also has to be accepted. This argument is fallacious. At the earliest juncture the case of the appellant is that K1 was tied at the wharf. Any improvement made to this case not supported by evidence cannot be taken note of. Further, when the policy regarding K2 expires at the stroke of 12 midnight of 11-11-1977, the appellant ought to have demonstrated beyond doubt that K2 was lost due to perils at sea during the currency of the policy. This has not been done. Ex-B15 to B17 which are alleged to be certificates of Inspectors certifying that the loss of the boats were reported are of no avail to prove the presence of the boats. The person issuing the certificate has not been examined. The Trial Court rightly rejected the evidentiary value of these three certificates. There is no proof that the salvaged materials alleged to belong to K2, are in fact parts of K2. While with regard to K1 atleast a broken bit of the name board is available which helps the Court to come to the conclusion that K1 must have been lost as pleaded by he appellant. Apart from the interested testimony of P.W.1, there is nothing to show that the salvaged materials belong to K2. The evidence with regard to loss of K2 is extremely scrappy and unsatisfactory. In these circumstances, it is not possible to accept any of the grounds raised by the appellant.

20. A.S.No.773 of 1987 is allowed with costs and Tr.A.S.No.429 of 1 989 is dismissed. No costs.

06-02-2002
Index:
Yes/No
glp

To

The Subordinate Judge,
Nagapattinam.
PRABHA SRIDEVAN,J.

Pre-delivery Judgment in

Appeal Suit No.773 of 1987
and
Tr. Appeal No.429 of 1989

06-02-2002